United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

951

In The

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 21 107

EARL CHARLES JAMES, Appellant

vs.

UNITED STATES OF AMERICA, Appellees

On Appeal From a Judgment of the United States
District Court for the District of Columbia

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Attorney for Appellant
Appointed by this Court

STATEMENT OF QUESTIONS PRESENTED

At the trial of a defendant charged with simple assault for the sexual touching of a competent and apparently willing person, is the issue of consent to the touching a question to be resolved by the jury or a matter of law to be ruled upon by the trial judge?

If a trial judge improperly invades the province of the jury and makes a factual determination with respect to an essential element of the crime, does he thereby impair the defendant's constitutional right to a jury trial in such a manner as to render the subsequent conviction void?

If a constitutional right was not so impaired as to render the conviction void, was the grossly inadequate instruction which failed to set forth the essential elements of simple assault nevertheless such "plain error or defect affecting substantial rights" as should be noticed although not brought to the attention of the trial court?

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UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 21, 107

EARL CHARLES JAMES, Appellant

vs.

UNITED STATES OF AMERICA, Appellee

On Appeal from Verdict and Sentence of
United States District Court for the
District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment finding Earl Charles James guilty of assault. Such judgment being a final decision of the United States District Court for the District of Columbia is appealable to this court (28 USCA 1291)

STATEMENT OF THE CASE

On Sunday night, July 17, 1966, at about 10 pm (T39) Anne Ellerbe was waiting for a bus at the corner of 34th and Benning Road, Northeast, in the District of Columbia. As she waited for the bus, she walked up and down the block to kill time. When she was in the middle of the block, facing the oncoming traffic, a car pulled to the curb and stopped beside Anne Ellerbe. She stated that the driver and sole occupant of the car pointed

a pistol out the window and said, "Get in here, don't scream; if you do, I'll shoot". She got in and she says the driver put the pistol under the car seat and that she never saw it again. Subsequently, the defendant was arrested, identified by Anne Ellerbe, and indicted for assault with a dangerous weapon. The jury found him not guilty of this charge. He was also charged with simple assault and found guilty thereof, based upon the following facts:

After Anne Ellerbe got in the car the driver asked her where she lived and offered to take her home. She told him where she lived and he proceeded to drive in that direction T43. Then he made a proposal of a sexual nature, "I'd like to suck your titties", in reply to which she remained silent. As they drove along he asked her again and this time she replied, "No mister, I couldn't do that" T21. Then he drove out onto the Baltimore Parkway and stopped on the side of the road. Anne Ellerbe said she got out of the car and walked across the parkway to hail a ride from traffic headed back to Washington and after a few minutes a car stopped, and as she went to get in she found it was the same car she had just got out of. The driver pushed her in and drove on towards Washington. On the way he renewed his proposal, she again refused but promised to come back out if he would take her home to feed her young child. Near her home he stopped the car in an alley, lowered the top of her dress and fondled her breasts. She was not beaten nor physically injured, nor were her clothes torn. He then drove her to her home and she again promised to come back out after she fed her child (T53). Instead she sent her teen-age daughter out to get his licence plate number (T68) and called the police when he continued to blow the horn on his car (T344). Several days later the appellant was arrested as the owner of the car, identified by Anne Ellerbe and charged with assault with a dangerous weapon, for allegedly having pointed a pistol at Anne Ellerbe, and with simple assault for having fondled her breasts.

The appellant offered the testimony of several witnesses to prove his alibi that he was in Gaithersburg, Maryland, at the time Anne Ellerbe was allegedly "picked up" at 34th and Benning Road in the District of Columbia.

STATUTES OR RULES INVOLVED

D. C. Code 22-504 Assault or threatened assault in a menacing manner. Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than five hundred dollars or be imprisoned for not more than twelve months, or both.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 52. Harmless error and plain error

(b) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF POINTS

The trial judge precluded the jury from considering an essential factual issue, by deciding that factual issue himself.

SUMMARY OF ARGUMENT

When the court instructed the jury that the act complained of constituted an assault per se, and that the touching was unlawful and against the will of the complainant, he thereby precluded the jury from considering whether there was consent to the touching, the lack of which is an essential element of the crime which must be proved beyond a reasonable doubt.

By so doing, the court deprived the appellant, in part, of his constitutional right to trial by jury, and thereby lost jurisdiction to render a valid judgment of conviction.

ARGUMENT

The court's charge to the jury with respect to the second count of the indictment is as follows: and attention is particularly invited to the portion of the charge which I have underlined.

"The second count in the indictment also is an assault, and the District of Columbia code provides that whoever unlawfully assaults another in a menacing manner, or threatens them in a menacing manner, shall be punished as the law provides. Now this pertains to the second situation over close to the home, allegedly close to the home of the complaining witness.

"Now assault - the Court has just read to you - I can read it again - that assault is defined by law as an unlawful attempt or effort with force and violence to do injury to the person of another, coupled with the present apparent ability of carrying out such an act.

"Now in the second assault that the Court recalls that the testimony was that there was an actual touching, which is not necessary in an assault case, but there was an actual touching, and unlawfully against the will of the complainant in question, and that also comes under the question of assault." (T401)

I would suggest that this wording virtually amounted to a judgment of conviction - a directed verdict that the act did constitute an assault and removed from the jury any consideration of the factual question which is

always involved in the sexual touching of a competent person; to wit: was there express or implied consent to the touching?

A man who takes improper liberties with the person of a female, without her consent, may be guilty of assault; Beausoliel v United States, 71 App. D.C. 111,115; 107 F (2d) 292,296. Generally where there is consent there is no assault; Guarro v United States, 99 US App. D.C. 97,100; 237 F (2d) 578,581. See Anno. 6 ALR 985,1014 (effect of consent). "Furthermore if the defendant in an assault prosecution 'believes, on grounds regarded as adequate, that he is dealing with a consenting person, he will be treated as if this were so ....' Putkammer, Consent in Criminal Assault, 19 Ill. L. Rev. 617,628 N.40 (1925)" Guarro v United States, 99 US App. D.C. 97,100; 237 F (2d) 578,581. See also Anno. 12 ALR (2d) 971,975: "... if such contact is without intent to injure her, or if there is reasonable ground for the belief that she will not object to it, there will be no assault."

Thus, absence of consent is an essential element of the crime, and as this court said in McAffee v United States, 70 App. D.C. 142,150; 105 F (2d) 21,29: "... it should be orthodox practice somewhere in the instructions to tell the jury once in precise terms that a Not Guilty verdict is necessary in the event of failure by the government to prove each of the elements of some offense beyond a reasonable doubt."

The instruction - set out above - with regard to what constituted the elements of simple assault was totally inadequate and did not measure up to the "orthodox" standards. I am aware that objection was not made at the trial and that in the absence of timely objection, this court does not ordinarily review questions raised for the first time on appeal although it has the right to do so (F.R.C.P. 52b) and on occasion considers, sui sponte, plain error not even raised by the Appellant. Williams v United States, 76 App. D.C. 299,300; 131 F (2d) 21, 22. But the problem here involves not only an

erroneous instruction, it involves also an intrusion by the Trial Judge into the province of the jury. When he charged that "there was an actual touching, and unlawfully against the will of the complainant" he determined a factual issue pertaining to an essential element of the crime and he thereby took away some of the Appellant's constitutional right to a trial by jury. When a defendant has been deprived of certain constitutional rights, courts have held such conviction void and subject even to collateral attack. Johnson v Zerbst, 304 US 458,467-8.

The Appellant here contends that the impairment of his constitutional right to a jury trial on all the material factual issues, rendered his conviction void, and that this Court should so decree, whether or not this issue was first presented to the trial court.

"In the final analysis, it is not the parties who determine the charge the judge gives the jury. The obligation rests squarely on the judge. Of course, the system of time tested rules of procedure can rightfully expect competent counsel to request appropriate charges or object to affirmative errors or significant omissions. But there are occasions .... in which the trial court's erroneous action has such immediate and significant consequence that it must be noted as plain error." Williamson v United States, 332 F (2d) 123 132, and cases cited.

CONCLUSION

The judgment appealed from should be reversed.

Respectfully submitted,

James D. Graham, Jr.
Attorney for Appellant
Appointed by this Court

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,107

EARL CHARLES JAMES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

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Cr. No. 1023-66

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

I. Whether it was error for the trial court not to instruct the jury that an offensive sexual touching does not constitute an assault if the complainant consents to such touching, where (1) there was no request for such an instruction and no objection on this ground to the instruction given and (2) there was no dispute on the issue of consent, appellant offering an alibi as a defense.

II. Whether it was error for the trial judge to comment on the evidence during the jury charge where (1) he merely stated that according to his recollection the complainant testified that she did not consent to the touching, which in fact was an accurate recollection of the complainant's testimony, and (2) he instructed the jury that it was the sole trier of fact and that its recollection of the evidence, not his, was controlling.

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On August 29, 1966, a two count indictment was returned in the District Court charging that on July 17, 1966, appellant assaulted Mrs. Anne Ellerbe, in violation of D. C. Code § 22-502 and § 504. Appellant was found not guilty by the jury to the assault with a dangerous weapon, as charged in the first count, and guilty on the assault charged in the second count. On May 12, 1967, he was sentenced to imprisonment for six months followed by probation for a period of three and one-half years.

1. The Government's evidence showed that between the hours of 9:30 and 10:00 p.m. on July 17, 1966, while Mrs. Anne Ellerbe was waiting for a bus in the District of Columbia to take her home from a prayer meeting she had just attended, a dark convertible automobile driven by appellant (who was also the automobile's sole occupant) stopped at the curb (Tr. 19-21, 25, 61). Appellant slid over to the passenger side of the front seat, pointed a gun at Mrs. Ellerbe and said, "Get in here. Don't you scream. If you do I'll shoot." (Tr. 21). Mrs. Ellerbe complied with this directive and entered the car (Tr. 21, 23). Appellant then drove off, placing the gun he had been carrying underneath the front seat (Tr. 42-43). He asked Mrs. Ellerbe where she lived and told her he was going to take her home (Tr. 21, 43). However, after he had driven a short distance (Tr. 43-44), he looked at Mrs. Ellerbe and said, "I'd like to suck your titties." (Tr. 21). Mrs. Ellerbe made no reply and appellant repeated this statement. Mrs. Ellerbe told him, "No Mister, I couldn't do that." (Tr. 21.) Appellant then speeded up the automobile and Mrs. Ellerbe began to scream (Tr. 21). Appellant drove to the Baltimore Washington Parkway, and stopped on the side of the road (Tr. 21-22). Mrs. Ellerbe managed to get out of the car and run to the other side of the Parkway (Tr. 22). After Mrs. Ellerbe spent 10 to 15 minutes in an attempt to stop a passing car, one did stop, but it was the appellant who jumped out and forced Mrs. Ellerbe back inside the car (Tr. 22, 47-48). Once she was inside, he told her, "I'm going to kill you because I know you are going to tell the police." (Tr. 48-49). He then repeated his earlier obscene statement and Mrs. Ellerbe again replied that she couldn't do that (Tr. 24).

At this juncture, Mrs. Ellerbe asked appellant to take her home, telling him that she had to prepare milk for her baby. When appellant asked Mrs. Ellerbe, "If I take you home, will you come back?", she responded affirmatively (Tr. 24). Instead of taking Mrs. Ellerbe home, however, appellant parked in an alley in the Northeast section of

the District of Columbia (Tr. 22). Without Mrs. Ellerbe's consent or permission (Tr. 27, 52), he then pulled down her dress, sucked her breast and put his hand under her dress (Tr. 25).

During these events Mrs. Ellerbe screamed and unsuccessfully attempted to escape from the car (Tr. 26, 52). When Mrs. Ellerbe again promised to return if appellant would take her home, he acceded to her request (Tr. 26, 53-54). He parked in front of her house while she went in (Tr. 54).

Mrs. Ellerbe, whose clothes were in disarray and who was in tears, reported the events to her daughter and then to the police, who ultimately arrested appellant (Tr. 28, 63-64, 79, 103-105).

2. Through his own testimony and that of other witnesses, appellant claimed that on the evening of July 17, 1966, the date that the assault allegedly occurred, he was at a beer garden in Maryland; that he did not leave there to drive back to the District until midnight (Tr. 247, 159-160, 141-142); that Mrs. Ellerbe was in the neighboring vicinity that entire afternoon (Tr. 229-230, 302-309) and that at approximately 6:30 p.m. that evening, while he was at the Maryland beer garden, Mrs. Ellerbe had approached him and asked for a ride back to the District of Columbia, and that he had rejected her request (Tr. 245-246).[1]

Appellant's version was disputed both by Mrs. Ellerbe's testimony on the Government's direct case that she was at home during the afternoon of July 17, 1966, and by the Government's rebuttal evidence of two witnesses corroborating her testimony in this regard (Tr. 342, 354-355).

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[1] The testimony was apparently prompted by the need appellant felt to explain away the Government's evidence that Mrs. Ellerbe had given the police, the license number of appellant's automobile (See Tr. 64, 79).

STATUTES AND RULES INVOLVED

D. C. Code § 22-502 provides:

> Every person convicted of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

D. C. Code § 22-504 provides:

> Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than five hundred dollars or be imprisoned for not more than twelve months, or both.

Rule 30 of the Federal Rules of Criminal Procedure provides:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Rule 52 of the Federal Rules of Criminal Procedure provides:

> (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SUMMARY OF ARGUMENT

Appellant should not for the first time on appeal be permitted to claim error in the jury charge since he made no objection at the trial to any portion of the charge even though he was given ample opportunity to do so before the jury retired. In any event, there is no merit to either of his claims of prejudicial error.

The failure of the trial court to specifically instruct the jury that an offensive sexual touching does not constitute an assault if the complainant consents to such touching was not error since the complainant's lack of consent was established by uncontroverted evidence and was never put in issue by the appellant whose only defense was that of alibi. The jury was correctly charged as to the applicable law with regard to the particular factual situation before it.

The trial judge did not improperly comment on the evidence during the jury charge since he merely stated that according to his recollection the testimony was that the complainant did not consent to the touching. Since such was the undisputed fact and since the jury was further instructed that it was the sole trier of fact and that its memory of the evidence, not the memory of the trial judge, was controlling, there could hardly have been error in this brief comment.

ARGUMENT

The trial court did not commit error in its instructions or comments to the jury. Appellant's sole claim is that the trial judge committed reversible error in his instructions, first by failing specifically to advise the jury that a sexual touching does not constitute an assault where there is consent to the touching, and second by his brief statement in the instructions that it was the court's recollection of the testimony that the complainant did not consent to the touching.

We point out at the outset, that at no time during the trial did appellant object to these instructions and comments of the trial judge. Nor did he request any clarifying or amplifying instruction on the assault issue. Indeed, just before the jury retired to deliberate, defense counsel stated that the "defense [was] satisfied" with the instructions. (Tr. 404) In these circumstances, appellant should not be heard to assert error in these matters on appeal. See Rule 30, Fed. R. Crim. P. In any event,

neither of appellant's contentions have any substance—much less do they point to "plain error" under Rule 52(b) of the Fed. R. Crim. P.

I. It was not error for the trial court not to instruct the jury that an offensive sexual touching does not constitute an assault if the complainant consents to such touching where (1) there was no request for such an instruction and no objection on this ground to the instruction given and (2) there was no dispute on the issue of consent, appellant offering an alibi as a defense.

(Tr. 399, 401-3)

In addition to the usual instructions applicable to every criminal case (e.g., that the Government has the burden of proof beyond a reasonable doubt (Tr. 396-397) and the presumption of an accused's innocence (Tr. 398-399)) the trial judge quite properly tailored his instructions to the issues that were raised. He thus twice defined the basic element of the offense charged, advising the jury that an assault was (Tr. 399, 401):

> an unlawful attempt or effort with force or violence to injure the person of another coupled with the present ability of carrying out such an act.

This was the correct legal definition of that offense under the relevant District of Columbia Code provisions. See *Beausoliel* v. *United States*, 71 App. D. C. 111, 114, 107 F. 2d 292, 295 (1939); *Guarro* v. *United States*, 99 U.S. App. D. C. 97, 99, 237 F. 2d 578, 580 (1956).

Moreover, in response to appellant's sole trial defense of alibi, the trial court gave clear instructions to the effect that the Government had the burden to prove not only that an assault had been committed but that, in order to convict, the jury had further to find that the evidence established beyond a reasonable doubt that appellant was the perpetrator of assault (Tr. 401-403).

While it is true that the court did not specifically advert to the question of consent to the sexual touching this

omission stemmed from the fact that no claim had been made by the defense at trial that Mrs. Ellerbe had consented to appellant's sexual fondlings.[2] In fact, the direct opposite had been convincingly established by the uncontroverted evidence. (See statement *supra*). In these circumstances, fully applicable here is what this Court said in *Graham* v. *United States*, 88 U.S. App. D. C. 129, 187 F. 2d 87, 89, *cert. denied*, 341 U.S. 920 (1951):

> It is enough that the trial court correctly charges the jury as to the law with respect to the particular factual situation before it and leaves no doubt as to under what circumstances the crime can be found to have been committed.

The Government submits that the trial judge's instructions represented an adequate statement of the law applicable to "the particular factual situation." No more was called for.

II. It was proper for the trial judge to comment on the evidence during the jury charge where (1) he merely stated that according to his recollection the complainant testified that she did not consent to the touching, which in fact was an accurate recollection of complainant's testimony, and (2) he instructed the jury it was the sole trier of fact and that its recollection of the evidence, not his, was controlling.

(Tr. 395-6, 401, 463-4)

There is clearly no basis to appellant's further claim of error based on the fact that the trial judge noted that during his instructions to the jury (Tr. 401):

> the court recalls that the testimony was that there was an actual touching * * * and unlawfully against the will of the complainant * * *.

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[2] The absence of any such controverted issue thus distinguishes cases such as *Guarro* v. *United States*, *supra*, where, since the question of the complainant's consent was squarely put in issue by the defendant at the trial, special instructions on the element of consent were deemed necessary.

Apart from the fact that a touching is not a necessary ingredient of assault, the court's brief comment did not purport to state what the actual *facts* were, (cf. *Hardy* v. *United States*, 118 U.S. App. D. C. 253, 335 F. 2d 288) nor did it represent a ruling that such had been established as a matter of law (*Mims* v. *United States*, 375 F. 2d 135 (5th Cir. 1967)). The court, acting within its discretion, simply advised the jury as to its recollection of the evidence. See *Jones* v. *United States*, 124 U.S. App. D. C. 83, 86, 361 F. 2d 537, 540 (1966). Indeed, we do not perceive how appellant could have been at all prejudiced by the court's brief comment on this issue since the question of consent had never been a subject of dispute at trial. See *Malone* v. *United States*, 238 F. 2d 851, 852 (6th Cir. 1956); *Richardson* v. *United States*, 120 U.S. App. D. C. 375, 338 F. 2d 553 (1964).

In any case, both at the outset and conclusion of his instructions the trial court made perfectly clear that the jury was "the sole and exclusive" judge of the facts and that it was the jury's recollection of the evidence, not the court's, which was to govern the jury's findings (Tr. 395-396, 463-464). This was enough to dispel any doubt the jury might have had as to its functions (Tr. 395-396, 463-464). See *Jones* v. *United States*, *supra*.

CONCLUSION

The points raised by the appellant on appeal were not preserved by him through appropriate objections at trial and, in any case, are without merit.

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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